In The

SUPREME COURT of the UNITED STATES

ALVANTA MENDOZA,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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OCTOBER TERM 1958

No. .....

ALVANIA MENDOZA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Your petitioner, Alvania Mendoza, prays that a Writ of Certiorari issued to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case on April 28, 1958, and on June 15, 1958.

OPINIONS BELOW

The Supreme Court of Appeals of Virginia rendered an opinion which is recorded as Mendoza v. Commonwealth, 199 Va. 961, 103 S.E. 2d 1.

The opinion is appended to this petition.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was pronounced on April 28, 1958. A petition for rehearing was denied on June 15, 1958. The jurisdiction of the Court is invoked under 28 U.S.C.A., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether a confession extracted at Police Headquarters of an elderly woman who suffered from high blood pressure violated the 14th amendment to the United States Constitution, when the police failed to warn her that any statement made by the accused might be used against her in a court of law.

2. Whether the confession extracted from an elderly woman who suffered from high blood pressure was voluntarily made when the accused feared she was going to have a stroke.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision which the case involves is the 14th amendment to the United States Constitution, to-wit:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History of the Case

The grand jury indicted petitioner for committing an abortion upon a woman named Villis Lee Green in August, 1956. The case was tried before a jury in the Corporation Court of the City of Norfolk, Virginia, on November 8 and 9, 1956. The jury returned a verdict finding petitioner guilty, as charged in the second count of the indictment, and fixed the penalty as three years in the state penitentiary.

On March 11, 1957, the Corporation Court entered a final judgment overruling the motion to set aside the verdict and to grant a new trial.

Petitioner was granted a writ of error by the Supreme Court of Appeals of Virginia. Printed briefs were filed. Oral argument was presented to the Supreme Court of Appeals of Virginia which on April 28, 1958, handed down a written opinion affirming the judgment.

Thereafter petitioner filed with the Supreme Court of Appeals of Virginia a printed petition for a rehearing and the rehearing was denied on June 15, 1958.

B. Facts

Petitioner is a Negro woman 62 years old (Tr. p. 107). For many years she has suffered from hypertension. Her

physician, Dr. J. T. Sydnor, had advised her to avoid excitement which could cause a stroke (Tr. p. 104). She had been taking medicine for the relief of high blood pressure and had been confined to her bed (Tr. p. 106). On August 29, 1956, petitioner was peeling apples in her home in Norfolk, Virginia, when suddenly the Assistant Commonwealth's Attorney of the City of Norfolk, accompanied by four detectives, broke into the home of the petitioner, two around the front and two around the back, with the prosecuting attorney. The police arrested her. The petitioner testified that she was grabbed and "My blood was so high I asked them to stop a little while to let me take some medicine to compose myself, and they still kept on questioning me. * * * I thought I was on the verge of a stroke." (Tr. pp. 148-149). She further testified "I said anything to get them off me as I was thundering in my head." (Tr. p. 157). She further testified "The strain I was under, I told them anything, everything, to get them off me. * * * I remember being real sick because I had just come downstairs out of bed. * * * They frightened me to death, and they came and jumped on my arm." (Tr. p. 159).

She was then interrogated by the Assistant Commonwealth's Attorney. (Tr. p. 58). There is no evidence that the quasi judicial officer, the Assistant Commonwealth's Attorney, warned her of any constitutional rights. The fact of the interrogation by the Commonwealth's Attorney is not stated in the record from the petitioner, but by Detective Steppe of the Norfolk Police Department, and Detective Steppe testified at Page 61 as follows: "I am certain of it, that Mr. Spencer had one arm like this (indicating) with his hand, and she was putting this other one, other thing she had in her pocket. She came up with

her hand from here (indicating), and I stepped around in front of her, and she put it behind her and Mr. Spencer had her by the arm." The Detective further testified "I got hold of the other hand because I didn't know what was in it."

The uncontradicted evidence is that the house was searched for over two hours and nothing was found, save and except assorted medicine bottles, pills, hair lotions, etc., without any instrumentalities of any kind. (Tr. p. 94). The officer testified that there were no medical instruments. (Tr. p. 63). The Commonwealth's Attorney also searched the house. (Tr. p. 63).

She became very excited. They took her to the police headquarters to the Homicide Office for questioning (Tr. p. 67). They questioned her intensely before taking a statement from her (Tr. p. 81). The uncontradicted evidence is that the police did not advise her that she did not have to make any statement or that anything she said would be held against her in Court. The uncontradicted evidence is that she was not advised of her constitutional rights against self-incrimination (Tr. p. 82).

Thereupon the police took a statement from petitioner that she had inserted a piece of elm bark into the privates of a Negro woman named Villis Lee Green to perform an abortion (Tr. p. 68).

At the trial petitioner testified that Mrs. Green had come to petitioner's home. There Mrs. Green stated that she had been working on herself two weeks and wanted something to stop the flow of blood. (Tr. p. 146). Petitioner advised her to see a physician (Tr. p. 147). Mrs. Green returned to petitioner's home with her husband for the purpose of

stopping the flow and petitioner again advised her to see a physician (Tr. p. 147).

Petitioner denied that she used the elm bark and denied that she caused the abortion (Tr. p. 158). She stated that she gave the statement to the police because she feared a stroke and wanted to keep the police quiet (Tr. p. 149). She said that she was frightened by the police (Tr. p. 159). Mrs. Green had told her that she had been using the elm bark on herself.

Mrs. Green had had a previous abortion on April 5, 1953, in the Norfolk Community Hospital (Tr. p. 115). At that time she had a septic abortion (Tr. p. 116). Dr. A. C. Fentress treated her in 1953 (Tr. p. 115). She had been bleeding from the vagina about three weeks before the abortion (Tr. p. 116).

Shortly before the alleged abortion, on August 8 or 9, 1956, Mrs. Green had visited a midwife named Liza Payton (Tr. p. 139). She informed Mrs. Payton that she was flowing and that she had done something to herself and wanted ergot for the purpose of committing abortion (Tr. p. 141).

The uncontradicted evidence is that no one saw the alleged abortion. On August 29, 1956, Dr. Charles O. Barclay, Jr., and Dr. Robert J. Faulconer performed an autopsy on Mrs. Green. Neither doctor found any evidence of trauma in the uterus (Tr. pp. 11 and 33). Mrs. Green died on August 26, 1956 (Tr. p. 44). Her husband, Joseph Green, testified that his wife did not want the child because she worked (Tr. p. 53). Mrs. Green worked as late as August 20, 1956 at a tobacco factory in Norfolk, Virginia (Tr. p. 51). Her husband testified that she passed

a little infant baby that she got rid of down the commode (Tr. p. 49).

C. Federal Questions Raised Before the Trial Court and Before the Supreme Court of Appeals of Virginia

1. In Trial Court:

Counsel for petitioner, at the conclusion of the evidence presented by the Commonwealth, moved the trial court to strike the evidence and argued that petitioner was not advised of her constitutional rights under the Constitution of the United States (Tr. p. 97).

At the conclusion of all of the evidence counsel for petitioner renewed his motion to strike and argued that the confession was not voluntary and that petitioner feared she was going to have a stroke (Tr. p. 165).

Counsel for petitioner excepted to the refusal of the court to grant instruction D-5, which told the jury that the confession was insufficient for conviction unless corroborated by evidence tending to prove the corpus delicti, on the ground that the confession violated petitioner's rights under the United States Constitution and that it was not voluntary (Tr. p. 171).

Counsel for petitioner excepted to the refusal of the Court to grant Instruction D-13, which told the jury that they had the right to reject the confession if they did not believe that the confession was freely and voluntarily made, on the ground that the confession was not voluntarily made (Tr. p. 172).

After the jury returned its verdict, counsel for petitioner moved the court to set aside the verdict and argued that the confession was not voluntary (Tr. p. 181).

Police Officer L. L. Buskey admitted on cross examination that he did not warn her about her constitutional rights and did not tell her that any statement made would be held against her (Tr. p. 82).

From the above facts, which are uncontradicted both from the prosecution and the defense, the arrest and the extraction of the statement may be easily stated as not in the American way of life, but probably of some of the dictatorial countries.

II. *Before the Supreme Court of Appeals of Virginia:*

Assignment of Error No. 6 filed in the Corporation Court of the City of Norfolk, Virginia, with the Notice of Appeal to the Supreme Court of Appeals of Virginia stated:

"The Court erred in permitting the police officers to testify as to an alleged confession made by the defendant when the police officers testified that they had failed to warn the defendant that any confession made by her would be held against her in a Court of law, thereby violating her constitutional rights against self-incrimination."

The Opinion of the Supreme Court of Appeals of Virginia held that the fact that the accused was under duress and was not warned that her statements might be used against her did not render her confession inadmissible. The court held that although it is the better and safer course for an officer to warn a person that a statement may be used

against him, it is still admissible if the confession is voluntarily made.

The petition for a re-hearing filed with the Supreme Court of Appeals of Virginia discusses the violations of petitioner's constitutional rights (pp. 3 and 4 of Petition).

ARGUMENT

I. Petitioner's rights under the Due Process Clause of the 14th Amendment to the United States Constitution were violated by the use at the trial of the confession, and a new trial should be awarded. This contention is based upon the following reasons: (1) that it was the duty of the police, before taking any confession from petitioner, to warn her that any statement made by her would be used against her; and (2) that the confession was not voluntarily made, directly or indirectly considering petitioner's high blood pressure and her fear of a stroke.

In *Ciccnia* v. *Lagay*, No. 171, 26 United States Law Week, No. 51, Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Black concurred in a dissenting opinion, wrote that petitioner's constitutional rights had been impaired when the police obtained a confession from a prisoner who had been in custody for 7 hours without the right of counsel.

In *Crooker* v. *California*, No. 178, 26 United States Law Week, No. 51, Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black and Mr. Justice Brennan concurred, in a dissenting opinion, held that a confession extracted from the accused without the right to counsel denied the accused due process of law guaranteed by the 14th Amendment.

The Opinion of the Supreme Court of Appeals of Virginia assumes that the confession was voluntarily made. However, the evidence of the petitioner shows that she was sick with high blood pressure, was fearful that she was going to have a stroke and made the confession in order to be free of the police officers. This explanation of petitioner indicates that she did not make the confession freely and voluntarily. Furthermore the trial court refused to grant Instruction D-13, to-wit:

"The Court instructs the jury that if they did not believe that the confession made by the defendant, Alvania Mendoza, and read by the detective in his evidence to the jury, was freely and voluntarily made, then they have the right to reject it wholly from consideration."

The evidence is without contradiction that petitioner had been confined to her bed for a long length of time and had required medical treatment. She had been warned by the physician, Dr. J. T. Sydnor, that excitement could cause a stroke. She was peacefully peeling apples at her home when she was forced out of her home and taken to Police Headquarters where she was grilled for about 3½ minutes. She was under duress at Police Headquarters where the alleged confession was taken.

In *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.ed. 568, the court held that any doubt as to whether a confession was voluntary must be determined in favor of the accused.

In *Haley* v. *Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.ed. 224, the court held that the Supreme Court of the United States determines for itself from the evidence whether a confession in a state court was voluntary.

In *Leyra* v. *Dennis*, 347 U.S. 556, 74 S Ct 716, 98 L ed 948 the court held that the use in a state criminal trial of a defendant's confession obtained by coercion, whether physical or mental, is forbidden by the 14th Amendment.

In *Lyons* v. *Oklahoma*, 322 U.S. 596, 64 S Ct 1208, 88 L ed 1481, the court held that the voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of mental freedom to confess to or deny a suspected participation in a crime.

In *Fikes* v. *Alabama*, 352 U.S. 191, 77 S Ct. 281, 1 L. ed 2d 246, the court held that whether a confession made by one accused of crime is coerced depends, upon a weighing of the circumstances of pressure against the power of resistance of the person confessing; what would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal. Held: The circumstances of pressure applied against the power of resistance of petitioner, who was weak of will or mind, deprived him of due process of law contrary to the 14th amendment.

In *Wilson* v. *United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L ed 1090, the court held that when there is a conflict of evidence as to whether a confession is voluntary or not, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject the confession if they are satisfied that it was not voluntary.

CONCLUSION

Petitioner respectfully request that a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

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APPENDIX

Present: Hudgins, C. J., and Eggleston, Spratley, Buchanan, Whittle and Snead, JJ.

Record No. 4782

ALVANIA MENDOZA

-v-

COMMONWEALTH OF VIRGINIA

OPINION BY CHIEF JUSTICE EDWARD W. HUDGINS, Richmond, Virginia, April 28, 1958

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK
H. Lawrence Bullock, Judge

This writ of error brings under review a verdict and judgment sentencing Alvania Mendoza, hereinafter designated the accused, to three years confinement in the penitentiary for producing an abortion on Villis Lee Green.

The accused's first contention is that the lower court

committed reversible error in refusing to strike the evidence or to set aside the verdict on the ground that the Commonwealth failed to prove the *corpus delicti*.

Villis Lee Green, a married woman, died on August 22, 1956. Her body was exhumed on August 29, 1956, and an autopsy performed by Doctors Charles O. Barclay, Jr., and Robert J. Faulconer. Dr. Barclay, Medical Examiner for the city of Norfolk, testified that he concluded from the examination of the body that she had been pregnant and "died from septicema resulting from a septic criminal abortion." Dr. Faulconer testified that he and Dr. Barclay made a complete and thorough autopsy of Mrs. Green and found the uterus enlarged; that there were tissues or cells on the walls of the womb that are found with afterbirth; that the cells were well preserved "indicating they were alive at the time of the patient's demise," and that she died from septic abortion.

Joseph Green, husband of the decedent, testified that prior to August 21, 1956, his wife's health was good; that on that day she complained of severe pain and bleeding; that he, at her request, called on the accused. He said, "I asked her [the accused] if she did any work on my wife, Villis, and she didn't know her name and when I told her Kate she knowed her and I told her my wife was having a lot of pain and I would like for her to come to see her to see what she could do for her, and she told me that she had—she was three months gone and she was going to have a lot of pain anyhow, and for me to go to the drug store and get some medicine, called something she wrote down, and she gave me $1.10 to get it." The accused also told this witness to see a Dr. Burke, whose name and address she wrote on a slip of paper that was filed as an ex-

hibit and reads as follows: "838 Church Street upstairs, Dr. Burke, phone number Madison 23403." Green bought the medicine and asked Dr. Burke to call on his wife, which he did. Dr. Burke told Green to clean his wife's bed which was very bloody. In doing so, he found a fetus, said to be about three months old, that he threw in the commode.

After the doctors reported their conclusions from their examination of decedent's body, detective D. C. Steppe, officer Neighbors, Reid W. Spencer, Assistant Commonwealth's Attorney, and decedent's husband went to the home of the accused with a search warrant and a warrant for her arrest. She was in the back of the house peeling an apple. She jumped up from a sitting position and put her hands behind her. Spencer caught hold of her arm and Steppe caught the other arm and took from her hand a "hypo syringe and needle." She then turned and pointed to the decedent's husband and said, "I didn't do anything but what you told me to do. He brought his wife here for me to help her out, that he had more children than he could take care of." Spencer asked her, "Did you help her out?" She said, "Well, I tried to."

The accused was taken to the police station where she made a confession describing in detail how she produced the abortion, for which she said she charged decedent $50.00 and received $20.00 in cash. This confession was later transcribed, signed by her and read to the jury but the court refused to permit it to be filed as an exhibit in the case.

The evidence is not only sufficient to prove the *corpus delicti*, but it proves that the accused was the criminal agent.

The accused's next contention is that the court erred in permitting L. L. Buskey, a police officer, to read her confession to the jury. This contention is based on the sole ground that at the time she made the confession the officers did not warn her that her statements might be used against her.

"In Virginia, it is the function and duty of the trial judge in the first instance before admitting a confession to determine from the evidence, in the absence of a jury, whether the confession has been freely and voluntarily made. In this decision of a question of fact he has a wide discretion. *Omohundro* v. *Commonwealth*, 138 Va. 854, 121 S. E. 908.

"Thus the admissibility of a confession is a question for the court, and not for the jury. The court does not vouch for the confession, but admits it to the jury to be considered and weighed like other evidence. * * *" *Upshur* v. *Commonwealth*, 170 Va. 649, 655, 197 S. E. 435. *Campbell* v. *Commonwealth*, 194 Va. 825, 75 S. E. 2d 468.

The circumstances under which the confession was made are as follows: The officers arrived at the accused's home at about 4:00 p.m., August 29, 1956. They read and gave the accused a copy of a search warrant, searched the house, arrested her and took her to police headquarters where they arrived at about 5:15 p.m. There, in the presence of the officers and Dr. Barclay, the accused described what acts she had performed on decedent. She said that she made an instrument approximately 1 4 to 3 16 of an inch in circumference and two inches long out of elm bark to which she tied a string in such manner that it could not slip off the bark. She sterilized the bark and string, washed her hands in "Lysol" and with her hands inserted the bark

in the womb of decedent. The accused was given a piece of pine wood from which she made a similar instrument and to which she tied a string. These were filed as an exhibit in the case. At 5:50 p.m., thirty-five minutes after her arrival at police headquarters, the oral statements of the accused were transcribed by a stenographer in question and answer form, read and signed by the accused.

The objection to the introduction in evidence of the confession was not made until after the court had determined that it had been voluntarily made, had admitted it in evidence and the witness had been cross-examined in detail as to what took place in the interview with the accused. Following this extensive examination the court took a recess, and on reconvening the accused for the first time raised an objection to the introduction of the confession, and moved the court to strike it from the record. She offered no evidence tending to show that the confession was not freely and voluntarily made. Later she took the stand in her own behalf and admitted that she made the confession, read and signed it but claimed that she was sick, had high blood pressure, was on the "verge of a stroke" and made the statements in order to get rid of the officers.

There is no statute in Virginia requiring an officer to warn an accused in custody that any statement he may make concerning the crime with which he is charged may be used against him. However, we think the better and safer course for an officer to pursue, when a prisoner is about to make a statement, is to warn him that it may be used against him. If the confession is voluntarily made, it is admissible; if not, it should be excluded. The fact that the accused was under arrest when questioned by the officers and was not warned that her statements might be

used against her, does not render her confession inadmissible. The general rule is well stated in *State* v. *Thomas*, 241 N. C. 337, 85 S. E. 2d 300, 302, as follows:

"It is not essential to the competency of the defendant's confession that the officers should have cautioned him that any statement made by him might be used against him, and should have informed him that he was at liberty to refuse to answer any questions, or to make any statement, and that such refusal could not thereafter be used to his prejudice. It suffices if the statement were voluntary. * * * *James* v. *Commonwealth*, 192 Va. 713, 66 S. E. 2d 543; *State* v. *Lord*, 225 N. C. 354, 34 S. E. 2d 205; *State* v. *Matthews*, 231 N. C. 617, 58 S. E. 2d 625, *cert. den.* 340 U. S. 838, 71 S. Ct. 24, 95 L. ed. 615; 5 Michie's Jur., Criminal Procedure, § 56, p. 405; 22 C.J.S., Criminal Law, § 822, p. 1441; 20 Am. Jur., Evidence, § 505, p. 435.

The accused claimed that she was suffering from high blood pressure and had been advised by her doctors to avoid "excitement and chaos." In support of this claim she called Elizabeth Whitehurst, her daughter, who testified that she lived in the home with her mother; that the accused had suffered with high blood pressure for more than 10 years, was under the constant care of several doctors, was unable to stand any excitement, was required to take medicine regularly and was sick in bed two or three times a month. After admitting on cross-examination that she had talked to officers Neighbors and Buskey about her mother's condition, this witness was asked: "Didn't you tell detective Neighbors at that time that your mother had promised you she was not going to do that any more, referring to the abortion?" The accused promptly objected to the question and its admissibility was argued in the ab-

sence of the jury. When the jury returned the Commonwealth's Attorney changed the question to read as follows: "Was it because of your mother's condition of health that you had this discussion with her concerning abortions?" The witness answered: "No, sir. That was five years ago when she promised me that." We find no reversible error in the court's refusal to sustain the accused's objection to this question and answer.

There is no merit in the accused's contention that the lower court erred in refusing to give 10 instructions requested by her. The court gave 14 instructions, three requested by the Commonwealth and 11 requested by the accused, which fully and fairly informed the jury of the legal principles applicable to the evidence in the case. Furthermore, the grounds of objection and the assignments of error to the rulings of the court on the instructions were not made and preserved as required by Rules 1:8 and 5:1, § 4.

The accused's final contention is that the court erred in overruling her objection to that part of the closing argument on behalf of the Commonwealth included in the following extract from the record:

"Mr. Spencer [Assistant Commonwealth's Attorney]: This is one of the most serious offenses that can be committed in the Commonwealth of Virginia, and our Legislature thinks it sufficiently serious that they have fixed the punishment from three to ten years.

"One life has departed from this earth because of her conduct. One life which never came into being departed and was released and flushed down the drain.

"Mr. Fine [attorney for the accused]: We object to that. She is being tried for abortion, not manslaughter.

"The Court: The motion is overruled.

"Mr. Fine: Note an exception, sir, because it is prejudicial and misleading.

"The Court: The instructions apply to the crime of abortion.

"Mr. Spencer: I refer to the crime of abortion, the punishment for which is from three to ten years in the penitentiary. That is what she is being tried for."

There is no merit in this contention. This argument was not an appeal to passion or prejudice. It was a correct statement of the maximum and minimum punishment prescribed by Code, § 18-68 for producing a criminal abortion, and a statement of facts supported by the record.

For the reasons stated the judgment of the trial court is affirmed.

Affirmed.